

SEC Ratchets Up Form PF (Again)

On February 8, 2024, the U.S. Securities and Exchange Commission (“SEC”) and the Commodity Futures Trading Commission (“CFTC”) adopted a second set of amendments to Form PF (the “Final Amendments,” available [here](#)) to expand reporting by SEC-registered investment advisers (“RIAs”) to hedge funds and complex private fund structures. These Final Amendments largely track the agencies’ proposed amendments from August 2022 (the “Proposal,” discussed in our [blog post](#)), imposing significant additional and burdensome reporting obligations. If this feels familiar, that’s because the digital ink is still wet on the SEC’s [Spring 2023 amendments to Form PF](#), which introduced quarterly private equity event reports for all PE fund advisers and current event reporting for large hedge fund advisers (both now effective) and expanded annual reporting for large private fund advisers (effective in June 2024).

In the Final Amendments’ adopting release (the “Adopting Release”), the SEC states that these changes are designed to enhance the Financial Stability Oversight Counsel’s (“FSOC”) goals in monitoring systematic risk, while also bolstering the SEC’s regulatory oversight of private fund advisers and investor protection efforts. It remains to be seen whether the Final Amendments meaningfully advance these goals, and Commissioner Mark Uyeda questioned in a [concurrent statement](#) whether the uncertain impacts on systemic risk and investor protection are signs that the Final Amendments exceed the SEC’s authority under the Dodd-Frank Act. Should industry groups bring litigation to challenge this rulemaking as they have with the pending Private Fund Adviser Rules (discussed in our [alert memo](#)), this statement will feature prominently.

The Final Amendments will become effective on March 12, 2025, to apply for the 2025 filing season.

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Notable Requirements and Guidance

The Final Amendments largely adopt the Proposal, with tinkering around the edges. Highlights include:

Disaggregating complex fund structures:

The Final Amendments, as proposed, eliminate adviser discretion for reporting complex structures in current Section 2a of Form PF. An RIA will no longer be able choose whether to report master-feeder arrangements and parallel fund structures in the aggregate or separately. While the current discretionary approach was intended to reduce the regulatory burden on RIAs by allowing them to produce Form PF reporting that is consistent with internal recordkeeping and reporting, the SEC stated that the FSOC's goals and comparability across advisers are more important. The Final Amendments require RIAs to report each component fund of a master-feeder arrangement and parallel fund structure. A "master-feeder arrangement" is defined as an arrangement in which one or more funds ("feeder funds") invest all or substantially all of their assets in a single private fund ("master fund"). A "parallel fund structure" is defined as a structure in which one or more private funds (each, a "parallel fund") pursues substantially the same investment objective and strategy and invests side by side in substantially the same positions as another private fund.

While the Adopting Release does not speak to whether a single vehicle with multiple series (or classes) should be treated as a parallel fund structure, with each series being separately reported, Form PF states that where a private fund has issued two or more series (or classes) of equity interests whose values are determined with respect to separate portfolios of securities and other assets, then each such series (or class) should be regarded as a separate private fund. Form PF notes that this only applies with respect to series (or classes) that the RIA manages as if they were separate funds and not a fund's side pockets or similar arrangements. Form ADV sets a similar standard for reporting a private fund with two or more series (or classes) as multiple clients; it should therefore be sensible to report such funds as one private fund (and not parallel

funds) if that is consistent with the funds' treatment on Form ADV.

Disaggregation does not apply in all circumstances – an RIA must continue to aggregate these structures to determine whether it meets reporting thresholds (e.g., whether it is a large hedge fund adviser). However, in a change from the Proposal, a feeder fund that invests in assets outside its master fund will only consider its non-master fund investments when determining the reporting thresholds. A feeder fund that invests all of its assets in a single master fund, U.S. treasury bills, or cash and cash equivalents and has no outside assets is disregarded and does not need to be reported.

Parallel managed accounts:

The Final Amendments adopt the Proposal's prohibition on separate reporting of "parallel managed accounts," except that RIAs will continue to report the total value of parallel managed accounts relating to each specific reporting fund. A "parallel managed account" is any managed account or other pool of assets managed by the RIA that pursues substantially the same investment objective and strategy and invests side by side in substantially the same positions as the identified private fund. The SEC notes that including parallel managed accounts in the reporting "may reduce the quality of data for [their] analyses while also imposing additional burdens on advisers." On the other hand, required reports of total values will improve FSOC's ability to analyze systemic risk by allowing them to consider the total assets RIAs are managing under a particular strategy.

The SEC's approach here means that the technical distinctions between a "fund of one" and a separately managed account ("SMA"), which the staff have not clearly defined, will lead to different reporting requirements: An SMA would fall within Form PF's definition of a "parallel managed account" and should have its total value reported along with its related private fund, while a fund of one would continue to be separately reported as a "parallel fund." Given the similar objectives of investors who co-invest with a private fund through a fund of one or SMA, the disparate treatment under Form PF seems to be a strange result, albeit one which is consistent with Form

ADV where a fund of one may reasonably be listed as a private fund client under Item 7.B and a SMA is instead subject to certain aggregate disclosures of borrowings and other exposures in Item 5.K.

In addition, the Adopting Release also does not address the potential implications and contradictions between the required treatment of parallel managed accounts and parallel funds for Form PF reporting versus the treatment of “similar pools of assets” in quarterly reports under the Private Fund Adviser Rules, despite the overlap in how these vehicles are defined. A “similar pool of assets” under the Private Fund Adviser Rules is a pooled investment vehicle with substantially similar investment policies, objectives, or strategies to those of the private fund managed by the adviser or its related persons (the “or” in one definition and the “and” in the other meaning that all parallel funds are likely similar pools of assets, but not all similar pools of assets are also parallel funds).

The Private Fund Adviser Rules require RIAs to consolidate reporting for similar pools of assets to the extent doing so would “provide more meaningful information to the private fund’s investors and would not be misleading.” The adopting release for the Private Fund Adviser Rules notes that “there is no need to include [SMAs] in the definition of “similar pool of assets” because they are separately protected by the adviser’s fiduciary duty and do not need the protection of the Private Fund Adviser Rules, but they declined to make the same exclusion for co-investment vehicles as there are “certain circumstances” in which a fund of one or single investor fund can be a pooled investment vehicle and therefore can fall within the definition of “similar pool of assets” and be subject to consolidation into quarterly reports. The Adopting Release for these Final Amendments notes the SEC’s conclusion when first adopting Form PF that “aggregating parallel managed accounts for reporting purposes would be difficult and result in inconsistent and misleading data because the characteristics of parallel managed accounts are often somewhat different from the funds with which they are managed.” The SEC notes that, for example, in a

separately managed account a client generally selects an adviser’s strategy but “tailors it” to the client’s own investment guidelines. The Adopting Release may therefore support the position that aggregate reporting of a fund of one is likewise not meaningful for quarterly reporting purposes and that co-investment vehicles that do not have required tracking of investments to the main fund may not be similar pools of assets at all because the adviser’s strategy has been “tailored” by the co-investor’s investment guidelines.

Trading Vehicles:

“Trading vehicles” are separate legal entities wholly or partially owned by a private fund that hold assets, incur leverage, or conduct trading or other activities as part of the private fund’s investment activities, but do not operate a business. The Adopting Release acknowledges that they are primarily used for jurisdictional, tax, regulatory, bankruptcy or other structuring concerns, and Form PF does not currently require RIAs to identify trading vehicles.

However, and in a change from the Proposal, the Final Amendments require reporting trading vehicles on an aggregated basis – regardless of whether they are fully owned or partially owned by the reporting fund. RIAs must “look through” to the trading vehicle’s holdings for all reporting purposes (adjusted for the reporting fund’s percentage ownership interest of the trading vehicle). The Final Amendments also require RIAs to specify, for each trading vehicle, whether the reporting fund holds assets, incurs leverage, or conducts trading or other activities through the respective trade vehicle.

Investments in Fund of Funds:

As proposed, RIAs will no longer have the option to include or exclude fund of fund investments on Form PF. RIAs must include fund of funds investments in responses, unless explicitly directed otherwise by a specific question. But in a significant modification from the Proposal and from the current Form PF, RIAs will be required to include the value of investments in other funds to determine whether it must file Form PF, whether it meets the threshold for reporting as a large hedge fund adviser, large liquidity fund adviser or large private equity fund adviser, and whether a hedge

fund would be a qualifying hedge fund. We expect this change to substantially increase the scope and number of private fund advisers that must file Form PF, highlighting once again both the SEC and the CFTC's continued push to increase regulatory oversight of private funds and their advisers.

Assets under Management:

The Final Amendments adopt the Proposal's requirement that RIAs exclude the value of a private fund's investment in other "internal private funds" (defined as private funds that an RIA or its related persons advise) from its assets under management ("AUM"), in order to avoid double counting of fund of fund assets. A private fund's investments in "external private funds" (those advised by neither the RIA nor their related persons) will still be included. However, RIAs must include trading vehicles owned by a fund for the purpose of calculating AUM, due to the requirement to "look through" the trading vehicle's holding for reporting purposes. Because most RIAs seek to have consistency between their Form ADV and Form PF AUM figures, these changes may have knock-on effects with respect to how RIAs track AUM more generally.

Gross asset value and net asset value:

Currently Form PF only requires reporting of gross and net asset values as of the end of the reporting period. The Final Amendments adopt the Proposal's requirement for large hedge fund advisers and large liquidity fund advisers to instead report gross and net asset values as of the end of each month during the reporting period. Because that reporting may be burdensome for RIAs that don't otherwise calculate monthly figures, the Final Amendments allow RIAs the flexibility for certain questions to instead report gross reporting fund aggregate calculated value ("GRFACV") and reporting fund aggregate calculated value ("RFACV") which may be calculated using the RIA's own methodologies or those of its service providers, provided that these are consistent with information reported internally.

As proposed, all RIAs must also separately report the value of unfunded commitments included in the net

and gross asset values (or in the GRFACV and RFACV). As in current Form PF, unfunded commitments are included in asset values to provide comparable results to RAUM as calculated under Form ADV.

Inflows and outflows:

The Final Amendments, as proposed, require RIAs to report certain fund financial activity, including contributions to the reporting fund, withdrawals, redemptions or other distributions of any kind to investors. RIAs must include all new contributions from investors and exclude contributions of committed capital that they have already included in the reported gross asset value (as required under the RAUM methodology for Form ADV). Large hedge fund advisers and large liquidity fund advisers are required to provide this information for each month of the reporting period. These inflows and outflows will overlap with certain contribution and distribution reporting required on a private fund's quarterly reports under the Private Fund Adviser Rules, and RIAs should be mindful of achieving consistency despite the lack of alignment between new Form PF and the Private Fund Adviser Rules.

Fund Performance:

The Final Amendments largely adopt the Proposal's requirements for additional fund performance disclosure, including that all RIAs must provide gross and net fund performance as reported to current and prospective investors, counterparties or otherwise for specified fiscal periods. The reporting fund may report performance as either a time-weighted return or a money-weighted return, such as an internal rate of return; however, the methodology used for reporting performance should be consistent over time. An RIA must report its performance as a money-weighted internal rate of return (instead of a time-weighted return) if the reporting fund's performance is reported to investors, counterparties or otherwise as an internal rate of return since inception. While the Adopting Release acknowledges that quarterly performance reporting was also adopted under the Private Fund Adviser Rules, it does not address how such reporting should be reflected in Form PF figures. For example,

some RIAs intend to produce the legally required quarterly reports for investors and also separately provide performance reporting negotiated with fund investors or in fund documents, which could use different methodology. The Adopting Release further acknowledges that calculations of net and gross performance figures for Form PF may treat fees and expenses differently than the calculation of net and gross performance under the Marketing Rule.

RIAs must report additional performance-related information if the RIA calculates a market value on a daily basis for any position in the reporting fund's portfolio.

Expanded biographical data collection:

The Final Amendment adopts, as proposed, a general expansion of the identifying information gathered with respect to the reporting RIA, its related persons and their private funds. This includes legal entity identifiers, legal names for trading vehicles, more granular categorization of private funds types, indications of funds which are AIFs or UCITS, indications of base currencies for all reporting funds, and more granular reporting of beneficial ownership data.

The Final Amendments also adopt, largely as proposed, various changes to Section 2 of Form PF for large hedge fund advisers, including changes to investment exposure reporting, open and large position reporting, borrowing and counterparty exposure reporting and market factor effects reporting, as well as adding reporting on currency exposure, and enhancing portfolio and financing liquidity.

Withdrawal or redemption rights.

Form PF currently requires only large hedge fund advisers to report whether each qualifying hedge fund provides investors with withdrawal or redemption rights in the ordinary course. The Final Amendments scale back the Proposal's requirement to report withdrawal and redemption information for each reporting fund, and only requires such information for open-end private funds. "Open-end private funds" are defined as private funds that "offer redemption rights to investors in the ordinary course, which may be paid

in cash or in kind, irrespective of redemption frequency or notice periods and without regard to any suspensions, gates, lock-ups, or side pockets..."

"Closed-end private funds" are defined as private funds that issue securities, which do not provide the holder with "any right, except in extraordinary circumstances, to withdraw, redeem, or require the repurchase of such securities, but which may entitle holders to receive distributions made to all holders pro rata."

Although the Adopting Release notes that the agencies expect this modification to lead to substantially similar results as the Proposal, the expansive definition of "open-end private fund" likely broadens the scope of this reporting obligation. Previously, the Proposal only required withdrawal and redemption data for funds that provide these rights "in the ordinary course", while not defining what this might mean. But here, by specifying that an "open-end private fund" includes funds that offer these rights, even on an infrequent basis, the Final Amendments prevent RIAs from arguing, as they could under the Proposal, that irregular provision of withdrawal and redemption rights was not "in the ordinary course", and thus not required to be reported. Additionally, an RIA that notes that a reporting fund is neither an open-end private fund nor a closed-end private fund will be required to provide a detailed explanation for these responses in order to allow staff to understand the particular circumstances of a reporting fund's withdrawal or redemption rights.

If the reporting fund is an open-end private fund, the RIA will be required to report (i) how often withdrawals or redemptions are permitted and (ii) what percentage of the reporting fund's net asset value may be, or is, subject to a suspension of, or material restriction on, investor withdrawals/redemptions by an RIA or fund governing body. The RIA will be required to report this information regardless of whether there are notice requirements, gates, lock-ups, or other restrictions on withdrawals or redemptions.

RIAs should be mindful when classifying funds as open-end or closed-end for Form PF purposes. These same categorizations will impact the treatment of such

funds for purposes of the Private Fund Adviser Rules (where the rule categorizes funds as liquid or illiquid). These classifications are relevant when assessing if preferential treatment will have a material, negative effect on investors in the fund, or determining what performance information must be included in quarterly reports. While the definitions closed-end/open-end and liquid/illiquid fund do not align under the two rules, RIAs will need to take a thoughtful, consistent approach to categorization.

Digital Assets:

The Final Amendments generally adopted as proposed changes to Section 1c of Form PF, which requires RIAs to report information about the hedge funds that they advise, including requiring RIAs to indicate which enumerated investment strategy best describes the reporting fund's strategy on the last day of the reporting period. Like the Proposal, the Final Amendments add additional categories under this section, including one for "digital asset" strategies. But in a change from the Proposal, the Final Amendments no longer define "digital assets." Further, the Final Amendments' changes to Section 1c note that "[i]f a particular strategy could be classified as both a digital asset strategy and another strategy, report the strategy as the non-digital asset strategy." This change is a temporary win for RIAs, as the scaled back digital asset reporting may limit the ability of the SEC's Crypto Assets and Cyber Unit to utilize form PF to identify examination and enforcement targets. The SEC does not give a rationale for the change except to note that they continue to consider comments received on the digital assets approach, and to imply that a definition may be added to Form PF at a later date.

Future Headaches on the Horizon for Compliance Teams.

While the SEC seems to be finished tinkering with Form PF, the world of private fund reporting remains, surprisingly, a hotbed of activity. The SEC has placed adoption of proposed expansions to Form ADV relating to [ESG investment practices](#) on its Spring 2024 Reg Flex Agenda, and has additional proposed Form ADV amendments for [cybersecurity incidents](#)

waiting in the wings. If the [Private Fund Adviser Rule](#) survives its current litigation challenge, the first quarterly statements and audits under that rule will be due from March 2025, one month before RIAs with a December year end have to submit their first annual Form PFs on the newly adopted form. In the background, the SEC staff continue to tinker with requirements under older rule releases, such as the Marketing Rule, via [FAQ updates](#) and exam sweeps. And hedge funds which run afoul of the [new rule](#) supplementing the "dealer" definition under the Exchange Act may face entirely new reporting obligations if they are forced to register as dealers with the SEC and become members of FINRA.

The Final Amendments add a layer of uncertainty to many of these other reporting requirements, given substantive overlap (but not alignment) with many of the performance and cash flow figures that advisers must reporting to investors and include in marketing. That lack of alignment is perhaps a missed opportunity to offer a helping hand to market participants by reconciling the broad range of new requirements that have recently been adopted. The need to maintain multiple sets of performance and cash flow methodologies will undoubtedly prove difficult and costly for compliance teams, and be a source of easy deficiencies for the SEC's Division of Examinations.

The Adopting Release acknowledges that the increased cost of complying with Form PF reporting may cause smaller RIAs "to either exit or forgo entry" into the private fund market. Similar sentiments were made in the adopting release for the Private Fund Adviser Rules. Despite this, the SEC show no signs of slowing down.

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